[redacted]

[redacted]

[redacted]

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	7
INTRODUCTION: THE STATUTE AND REGULATIONS	7
I. "PERSONAL INJURIES" IN THE SENSE OF SECTION 104(A)(2) INCLUDE NONPHYSICAL INJURIES AS WELL AS PHYSICAL INJURIES	8
II. DISCRIMINATION IN VIOLATION OF TITLE VII RESULTS IN "PERSONAL INJURIES," AND A SETTLEMENT AWARD ON A CLAIM OF SUCH DISCRIMINATION IS RECEIVED ON ACCOUNT OF PERSONAL INJURIES	9
III. "DAMAGES RECEIVED" IN THE SENSE OF SECTION 104(A)(2) INCLUDE ANY MONETARY AWARD RECEIVED ON ACCOUNT OF PERSONAL INJURIES	11
IV. GOVERNMENT THEORIZING ABOUT "PERSONAL CAPITAL" OR "HUMAN CAPITAL," "ECONOMIC BENEFITS," "ACCESSIONS TO WEALTH" OR "ENHANCEMENTS OF WEALTH" IS MISDIRECTED AND PROVIDES NO BASIS FOR LIMITING THE EXCLUSION PROVIDED BY SECTION 104(A)(2)	14
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Bent v. *Commissioner*, 87 T.C. 236 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987) 9

Church v. *Commissioner*, 80 T.C. 1104 (1983) 9

Coleman v. *Commissioner*, 791 F.2d 68 (7th Cir. 1986) 15,16

Commissioner v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955) 14,15

Dixon v. *United States*, 381 U.S. 68 (1965) 18

Downey v. *Commissioner*, 97 T.C. 150 (1991) 9,10,19

Granzow v. *Commissioner*, 739 F.2d 265 (7th Cir. 1984) 16

Helvering v. *Clifford*, 309 U.S. 331 (1940) 14

Langley v. *Colonial Leasing Co. of New England*, 707 F.2d 1 (1st Cir. 1983) 13

Lonsdale v. *Commissioner*, 661 F.2d 71 (5th Cir. 1981) 16

Lovell v. *United States*, 755 F.2d 517 (7th Cir. 1984) 16

Medtronic, Inc. v. *Intermedics, Inc.*, 725 F.2d 440 (7th Cir. 1984) 12

Metzger v. *Commissioner*, 88 T.C. 834 (1987), *aff'd without published opinion*, 845 F.2d 1013 (3d Cir. 1988) 9

Norfolk & Western R. Co. v. *Liepelt*, 444 U.S. 490 (1980) 8

Pistillo v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990) 9,10

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 10,11

Rickel v. *Commissioner*, 900 F.2d 655 (3rd Cir. 1990) 9,10

Table of Authorities Continued

Page

Roemer v. *Commissioner*, 716 F.2d 693 (9th Cir. 1983) 9

Seay v. *Commissioner*, 58 T.C. 32 (1972) 9

Sparrow v. *Commissioner*, No. 90-1151 (D.C. Cir. Nov. 26, 1991) 6,11,12

Stubbs, Overbeck & Associates, Inc. v. *United States*, 445 F.2d 1142 (5th Cir. 1971) 18

United States v. *Kolibski*, 732 F.2d 1328 (7th Cir. 1984) 16

United States v. *Thomas*, 788 F.2d 1250 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986), *appeal of remand*, 934 F.2d 840 (7th Cir. 1991) 16

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e *et seq.* 2,*passim*

I.R.C. 1939, § 22(a) 14

Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379 (1989) 13

Revenue Act of 1918, ch. 18, § 213(b)(6) 13

Internal Revenue Code:

§ 61 14,17

§ 61(a) 15

§ 104 7

§ 104(a)(1) 13

§ 104(a)(2) 3,*passim*

§ 104(a)(3) 13

Regulations:

Treas. Regs. § 1.104-1(c) 8,11

Table of Authorities Continued

	Page
Revenue Rulings:	
Revenue Ruling 72-341, 1972-2 C.B. 32	17
Miscellaneous:	
Federal Rules of Civil Procedure, Rules 1 and 2 .	11
Griswold, *Cases and Materials on Federal Taxation (4th ed. 1954)*	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-42

UNITED STATES OF AMERICA,

Petitioner,

v.

THERESE A. BURKE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37 of the Rules of this Court, the National Women's Law Center files this brief *amicus curiae* in the above-entitled case. The brief supports the position of the respondents and urges affirmance of the decision of the Court of Appeals below:

The National Women's Law Center has filed with the Clerk of the Court the written consents of the parties to the case.

STATEMENT OF INTEREST

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to

the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes. Our interest in the instant case is based on our particular and long standing interest in assuring effective remedies for discrimination against women and minorities.

STATEMENT OF FACTS

The facts of the case are fully stated in the opinion of the Court of Appeals below and by the parties. Of particular importance, the Title VII[1] discrimination action brought by the respondents was settled by the payment of $5,000,000, to be distributed according to a formula which took into account length of service and rates of pay of the female employees who were represented in the action. However, there was no attempt to calculate specific awards of "back pay" which would equalize the aggregate wages or salaries received by female employees to those of male counterparts in the same wage or salary classifications.

Female employees had been paid for past services the full amount of wages or salary due by contract with TVA. The settlement proceeds were redress for acts of discrimination in violation of federal statute, and were not based on contract claims.

---

[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, hereinafter "Title VII".

SUMMARY OF ARGUMENT

The issue here is whether the settlement proceeds of a Title VII discrimination suit are excludable from federal income taxation under the terms of section 104(a)(2) of the Internal Revenue Code.[2] That section excludes from taxable income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness (except punitive damages in a case not involving physical injury or physical sickness). In determining whether the amount received by suit or agreement is on account of personal injury, the pertinent Treasury regulation states that the term "damages received" means an amount received through prosecution of a legal suit or action based upon tort or tort-type rights or through a settlement agreement entered into in lieu of such prosecution.

The judicial decisions under section 104(a)(2) make it clear that personal injuries include intangible (other than physical or bodily) injuries to the person, including violations of constitutional rights, defamation, and various statutory provisions protecting personal rights. Thus, the Court of Appeals below held that amounts received in a Title VII action by way of settlement of a gender-based discrimination suit are not taxable under section 104(a)(2). This conclusion follows from the view that gender-based discrimination is a personal injury not only resulting in economic inferiority but damaging to intangible personal status, self esteem, morale, and career prospects, *i.e.*, overall personally demeaning. Accordingly, an employer's vi-

---

[2] Unless otherwise noted, all references are to the Internal Revenue Code of 1986, as amended. 26 U.S.C. § § 1 *et seq.*

olation of Title VII standards results in a tort-type injury, monetary redress for which is excluded from taxable income.

The petitioner (the "Government") does not appear in its brief to attack the conclusion that tort-like personal injuries include intangible and statutory (Title VII) personal injuries. The Government has argued for a non-statutory, non-regulation distinction between "economic" recoveries and recoveries for injury to "personal capital" and "human capital," meaning harm to bodily parts.

Not only does this distinction have no support in the statute or regulations, but it also makes no real sense and would arbitrarily whittle down the exclusion of section 104(a)(2). It is simply an attempt to revive a long-abandoned Government position limiting section 104(a)(2) to recoveries for injuries to bodily parts. The concept of "personal capital" or "human capital" has no support in the tax law, which does not recognize a tax basis for gain or loss or for depreciation or amortization of this alleged human or personal capital. Moreover, even if the notion had some scintilla of tax validity, the Government argument reflects a very strange view of human beings as a collection of purely physical components, with no sensibilities, no personality, no hopes and fears, no self esteem, and none of those elements that make a human being complete. These intangible elements are plainly also a part of "personal capital," if such a concept is to be tax-cognizable.

Furthermore, the alleged contrast between "economic" recoveries for intangible injuries as "accessions to" or "enhancements" of wealth, and recoveries for injury to personal or human capital as non-accessions to or non-enhancements of wealth is an absurd fiction. To illustrate, by virtue of an accident caused by negligence, a secretary may lose the use of her arms for a while. Nevertheless, redress therefor, measured by lost wages, is an "economic" recovery. If, by virtue of defamation, a person sustains injury to his or her professional reputation, an award for redress of the defamation, measured by loss of income, is also an "economic benefit." If a person recovers money damages for interference with contractual relationships, once more the recovery, which may be basically measured by loss of income, is an "economic benefit." Finally, if a female employee is the victim of invidious and prohibited discrimination, a monetary award as a remedy for this personal injury is an "economic" benefit in the same sense as the foregoing examples. Simply put, where money is recovered for personal injuries, the money is an "economic" benefit.

The Government attempts further to argue that the money received in this case would have been taxable if it had been received as additional wages for past periods. Therefore, it *ought* to be taxable now. This analysis is basically defective. As the facts of this case establish, the settlement amounts received were not equal to and did not have the same effects as "back pay". Moreover, they were paid on account of the personal injury of discrimination. The *measure* of damages for the injuries should not be confused with the nature of the claim. The victims of discrimination did not sue because they were shortchanged by their employer; they sued because discrimination, with all of its concomitants, was illegal and gave rise to personal injuries.

Although the Government brief does not argue about the term "damages," the Court of Appeals for the D.C. Circuit has very recently held in *Sparrow* v. *Commissioner*, No. 90-1151 (Nov. 26, 1991), that an award pursuant to a Title VII action does not constitute "damages" under section 104(a)(2) because Title VII involves only "equitable" remedies under historic distinctions between law and equity. This strained and strange analysis ignores that for numerous purposes of jurisdiction and procedure the distinction between law and equity disappeared decades ago. Moreover, federal *statutory* provisions are not the work of a chancellor in equity. Importantly, the Court of Appeals opinion and decision totally ignores the so-called clean-up doctrine pursuant to which courts of equity have always been able to provide for "damages at law" as a supplement to traditional equitable relief. Finally and decisively, as the Treasury regulations to section 104(a)(2) make clear, all monetary amounts received for personal injuries are excludable as "damages" from income.

Whatever casuistries have been advanced in the attempt to defeat the tax exclusion provided for in section 104(a)(2), the language of that section and the Treasury regulations governs the case before this Court, and it is clear that the section applies to this case. If the executive and judicial branches of Government feel that the section 104(a)(2) exclusion is overbroad and reflects unsound policy, the remedy lies with neither the executive branch nor the courts, and certainly not in statutory construction by legerdemain. Rather, the appropriate remedy is to seek possible limiting provisions in the statute through Congressional action.

ARGUMENT

INTRODUCTION: THE STATUTE AND REGULATIONS

The starting point for analysis of an income tax issue is the statute itself, *i.e.*, the pertinent Internal Revenue Code provision. As a former Solicitor General of the United States and distinguished law professor observed long ago, "There is no use in thinking great thoughts about a tax problem unless the thoughts are firmly based on the controlling statute." Griswold, *Cases and Materials on Federal Taxation*, at 15 (4th ed. 1954). The pertinent statutory provision is contained in section 104 of the Internal Revenue Code, providing as follows:

> (a) In General. -
>
> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include —
>
> * * *
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;
>
> * * *
>
> . . . Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.
>
> * * *

To the extent that Treasury regulations are not inconsistent with the statute itself, they also have binding legal effect. Pertinently here, the regulations provide —

> *Damages received on account of personal injuries or sickness.* - Section 104(a)(2) excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.

Treas. Regs. § 1.104-1(c).

The statute and the Treasury regulations do not warrant or reflect the "great thoughts" which the Government has offered in its brief. As Justice Blackmun has observed, the purpose of section 104(a)(2) may well be simply "to confer a humanitarian benefit on the victim or victims of tort," referring to a District Court opinion which noted that the statute was "intended to relieve a taxpayer who has the misfortune to become ill or injured." *Norfolk & Western R. Co.* v. *Liepelt*, 444 U.S. 490, 501 (1980) (Blackmun, J., dissenting).

I. "PERSONAL INJURIES" IN THE SENSE OF SECTION 104(a)(2) INCLUDE NON-PHYSICAL INJURIES AS WELL AS PHYSICAL INJURIES

Without exception as far as we know, the courts have recognized that the term "personal injuries" in-

cludes intangible injuries as well as bodily or physical injuries. *See, e.g., Bent* v. *Commissioner*, 87 T.C. 236 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987) (violation of First Amendment rights); *Church* v. *Commissioner*, 80 T.C. 1104 (1983) (libel suit); *Seay* v. *Commissioner*, 58 T.C. 32 (1972) (injury to reputation); *Metzger* v. *Commissioner*, 88 T.C. 834 (1987), *aff'd without published opinion*, 845 F.2d 1013 (3d Cir. 1988) (gender and national origin discrimination); *Downey* v. *Commissioner*, 97 T.C. 150 (1991) (violation of ADEA); *Roemer* v. *Commissioner*, 716 F.2d 693 (9th Cir. 1983), *rev'g* 79 T.C. 398 (1982) (defamation); *Rickel* v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990), *aff'g in part and rev'g in part* 92 T.C. 510 (1989) (violation of ADEA). A detailed analysis of the concept of "personal injuries" appears in the recent opinion in *Downey* v. *Commissioner*, 97 T.C. 150, 157-64 (1991), as well as in the opinion below in this case.

II. DISCRIMINATION IN VIOLATION OF TITLE VII RESULTS IN "PERSONAL INJURIES," AND A SETTLEMENT AWARD ON A CLAIM OF SUCH DISCRIMINATION IS RECEIVED ON ACCOUNT OF PERSONAL INJURIES

The opinion of the Court below concluded that discrimination in violation of Title VII undoubtedly resulted in personal injuries. This followed the view of that same Court of Appeals in *Pistillo* v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990), *rev'g* 57 T.C.M. (CCH) 874 (1989), that discrimination in violation of the ADEA gave rise to personal injuries. The Court of Appeals for the Third Circuit has also held that age discrimination resulted in personal injuries. *Rickel* v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990), *aff'g in part and rev'g in part* 92 T.C. 510 (1989).

The Tax Court in the *Rickel* and *Pistillo* cases had denied an exclusion for back pay awards on the ground that the damages received, or part of the damages, were similar to damages for breach of contract and, in any event, were substitutes for taxable income. However, after the Courts of Appeal reversed these analyses and conclusions, the Tax Court in *Downey* v. *Commissioner*, 97 T.C. 150, 168-70 (1991), explicitly overruled its own decisions in the *Rickel* and *Pistillo* cases, on the ground that both the Tax Court previously and the Commissioner had confused the nature of discrimination claims with the consequences of the injury and with the nature of relief requested by taxpayers:

> We recognize that petitioner's recovery here of lost wages is similar to a recovery petitioner might have received in settlement of a contract claim. The record, though, contains no evidence that petitioner had any separate contractual claim .... requesting lost wages as relief; and we have found that petitioner received the amount at issue in settlement of the ADEA claim, not any other claim. Petitioners, thus, were entitled to exclude under section 104(a)(2) the nonliquidated damages received in settlement of the ADEA claim. 97 T.C. at 169-70.

Focusing particularly on Title VII which was the basis for the settlement award here, the purposes of the Title, as stated by Justice O'Connor, are "to deter conduct which has been identified as contrary to public policy and harmful to society as a whole," as well as to make persons whole for the injury suffered on account of discrimination. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring).

We do not understand that the Government has contended in its brief that Title VII does not involve tort or tort type rights giving rise to personal injury; rather, in a convoluted way, the Government argues that a "back pay" award, which might have been paid as additional taxable wages if the employer had not engaged in discrimination, ought to be taxable just as such wages would be, notwithstanding section 104(a)(2). This contention is specifically considered below (pages 17-19, *infra*).

III. "DAMAGES RECEIVED" IN THE SENSE OF SECTION 104(a)(2) INCLUDE ANY MONETARY AWARD RECEIVED ON ACCOUNT OF PERSONAL INJURIES

The Treasury regulations define "damages received" as amounts received through a legal suit or settlement agreement based upon tort or tort type rights. Treas. Regs. § 1.104-1(c). Obviously the reference to a legal suit is not an effort to distinguish between actions at law or actions at equity. The plain meaning is an action brought in a court. *See* Federal Rules of Civil Procedure, Rules 1 and 2.

Although the Government brief does not appear to dispute that "damages" were received in the case before the Court, the Court of Appeals for the D.C. Circuit has recently made this an issue. That Court of Appeals held in *Sparrow* v. *Commissioner*, No. 90-1151 (Nov. 26, 1991), that because Title VII is intended to provide equitable relief, and "damages" are historically a remedy at law, an amount received in a Title VII action for discrimination cannot be "damages" within the meaning of section 104(a)(2).

The decision in *Sparrow* is unique, as far as we know, in holding that an amount received for the personal injuries resulting from discrimination does not qualify as "damages." This belated new reading of section 104(a)(2) has no basis.

First, Title VII is not the creation of a chancellor in equity; it is part of a federal statute which reflects a Congressionally-created offense or violation, sets forth procedures, and sets forth remedies. The statute may have equitable overtones in its provisions for injunctive relief, but it is not a branch of equity jurisprudence.

Second, although the Court in the *Sparrow* case correctly noted that "damages" historically were a remedy at law, the Court wrongly concluded that "damages" therefore were not available in equity. Traditionally, courts of equity were not limited to so-called equitable remedies, and frequently applied the equitable clean-up doctrine to award "damages at law" in addition to "equitable" relief. The Court of Appeals in *Medtronic, Inc.* v. *Intermedics, Inc.*, 725 F.2d 440 (7th Cir. 1984), has focused on this historical power of equity courts:

> A suit seeking a mixture of legal and equitable relief could have been brought then, if at all, only in an equity court. A law court could not give equitable relief, incidental or otherwise, while a plaintiff in equity could ask the equity court to grant him *legal* as well as equitable relief—for example, *damages* as well as an injunction—under the equity clean-up doctrine.

725 F.2d at 442 (emphasis added), citing 1 Pomeroy, *A Treatise on Equity Jurisprudence*, § § 236-41

(1881); *Wright* v. *Scotton*, 13 Del. Ch. 402, 417-18, 121 A. 69, 76 (Del. Super. Ct. 1923); Dawson & Palmer, *Cases on Restitution*, 146-51 (2d ed. 1969). *See also Langley* v. *Colonial Leasing Co. of New England*, 707 F.2d 1, 6 (1st Cir. 1983) ("Given the claims for rescission, a chancellor would have had jurisdiction over Langley's whole suit against Major, including the claims for damages at law, under the so-called equitable clean-up doctrine."). Thus, while it is true that courts of law could not order the remedies exclusively available in courts of equity, courts of law had no monopoly on the awarding of damages.

Third, section 104(a)(2), as originally enacted, clearly contemplated that all recoveries for personal injuries, whether through insurance or otherwise, and not just through an award of "damages," were excluded from income. Section 213(b)(6) of the Revenue Act of 1918 first enacted, in a single provision, the income exclusions now contained in sections 104(a)(1) through (3) of the Code. It therefore appears that in this legislation Congress intended generally that recoveries for personal injuries be excludable from income.

Fourth, as limited by the 1989 amendment to section 104(a)(2),[3] the only personal injury recoveries not excludable from income for tax purposes are punitive damages, and then only in a case that does not involve a physical injury. Accordingly, with this sole exception delineated by the *Congress*, all recoveries

---

[3] Section 104 was amended by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379 (1989), to provide that section 104(a)(2) "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness."

for personal injuries, including, *e.g.*, amounts recovered for pain and suffering, are non-taxable.

The distinction between damages at law and equitable damages is thus no distinction at all for purposes of section 104(a)(2). As this Court noted long ago, in rejecting a taxpayer's hypertechnical argument based on historic property law, "the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic [tax] issue." *Helvering* v. *Clifford*, 309 U.S. 331, 334 (1940). The same observation seems appropriate when courts or administrators seek, by technical niceties or casuistries, simply to increase the federal treasury.

IV. GOVERNMENT THEORIZING ABOUT "PERSONAL CAPITAL" OR "HUMAN CAPITAL," "ECONOMIC BENEFITS," "ACCESSIONS TO WEALTH" OR "ENHANCEMENTS OF WEALTH" IS MISDIRECTED AND PROVIDES NO BASIS FOR LIMITING THE EXCLUSION PROVIDED BY SECTION 104(a)(2)

The government seizes upon the phrases "accession to wealth" and "enhancement of wealth" as they appear in the case of *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), proposing that these phrases limit the exclusion provided by section 104(a)(2). However, the *Glenshaw Glass* case deals only with the question of what is income under section 22(a) of the Internal Revenue Code of 1939 (section 61 of the present Internal Revenue Code). The issue was whether punitive antitrust damages, *i.e.*, two-thirds of treble antitrust damages, constituted gross income for tax purposes. The Court held sweepingly that any "accessions to wealth" may constitute gross income, observing the "all-inclusive nature of statutory gross income." 348 U.S. at 431, 432 n.11. The *Glenshaw*

Glass case was not a section 104(a)(2) case and did not involve an attempt by this Court to limit the exclusion of that section. To the contrary, since the tax concept of income is generally "all-inclusive," that decision, if anything, emphasized the importance of overriding statutory exclusions. Section 61(a) begins by stating "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . . ." The case now before the Court deals with an exception to income, not the general rule. The exception cannot be limited by references to the broad scope of the general rule, as the Government has attempted to argue.

In its brief, the Government seeks to develop a concept for tax purposes of "personal capital" or "human capital," redress for injury to which produces no "economic benefit." On the other hand, monetary damages for intangible injuries, it is asserted, represent "economic benefits," and therefore, in some way not readily apparent, economic benefits do not enjoy the protection from tax provided by section 104(a)(2). This theorizing not only has no support in the tax law generally, but is simply an attempt to engraft a limitation—which appears nowhere else—on section 104(a)(2).

When taxpayers have attempted to invoke the notion of "personal capital" or "human capital" for depreciation or amortization deductions to their tax advantage, the courts have contemptuously dismissed these efforts. As the Court of Appeals for the Seventh Circuit has noted in the case of *Coleman* v. *Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986):

> The billingsgate in appellants' briefs is customary in cases of this nature. Coleman says

> that wages may not be taxed because they come from his person, a depreciating asset. The personal depreciation offsets the wage, leaving no net income. Coleman thinks that only net income may be taxed under the Sixteenth Amendment—net income as Coleman defines it, rather than as Congress does. . . . These are tired arguments.

That Court referred to "hundreds of other cases" holding the same, citing as among them, *United States* v. *Thomas*, 788 F.2d 1250, 1253 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986), *appeal of remand*, 934 F.2d 840 (7th Cir. 1991); *Lovell* v. *United States*, 755 F.2d 517 (7th Cir. 1984); *Granzow* v. *Commissioner*, 739 F.2d 265, 267 (7th Cir. 1984); *United States* v. *Kolibski*, 732 F.2d 1328, 1329 & n.1 (7th Cir. 1984). *See also Lonsdale* v. *Commissioner*, 661 F.2d 71, 72 (5th Cir. 1981).

The Government suggests that damages on account of injuries to human capital would be nontaxable without regard to section 104(a)(2), while damages for other, intangible injuries result in "economic benefits," which are income taxable despite section 104(a)(2). However, in all monetary recovery cases for personal injuries there is in economic terms an accession to wealth, an enhancement of wealth, and an economic benefit. Were the notions proposed by the Government valid, section 104(a)(2) would serve no purpose whatever. Recoveries for bodily injury would, without regard to that section, be nontaxable; other recoveries would be taxable.

The attempt to distinguish "economic" recoveries from "human capital" recoveries is also inherently illogical. All dollar recoveries have an economic effect

and enhance economic wealth, unless property with an equal or greater tax basis is exchanged for the money. A recovery for bodily injury, which temporarily prevents working for wages, results in an "economic benefit" where the award is measured by a loss of wages. In other cases, *e.g.*, libel to professional reputation, damages may well be measured by an estimated loss of income, which, had it been received, would be fully taxable. These damages also produce an economic benefit; nevertheless the damages are excludable from income under section 104(a)(2).

The Government also asserts that Title VII is simply a "back pay" statute as if it were no more than a minimum wage statute. Pursuant to this characterization of Title VII, the Government contends that "back pay," if it had been received as wages in past periods, would have been fully taxable. Therefore, the argument runs, the back pay allegedly received by respondents under this back pay statute simply redresses a shortage of compensation income and should also be taxable. This is a circular argument: compensation for services is taxable; because the damages are allegedly equal to compensation income, the section 104(a)(2) exclusion should not apply; therefore the damages are taxable as compensation income.

The Government has of course omitted to mention this doctrine in the Treasury regulations drafted by the Government. There is a ruling, Revenue Ruling 72-341, 1972-2 C.B. 32, which reaches the Government's conclusion on an admitted back pay award, but the ruling interprets only section 61 of the Internal Revenue Code. It contains no reference to section 104(a)(2) or a limitation thereon. Moreover, contrary to the Government's assumption (Govern-

ment Br. 19), rulings are not the equivalents of Treasury regulations and have no authoritative standing. See *Dixon* v. *United States*, 381 U.S. 68, 73 (1965) (Congress has not given rulings the force of law); *Stubbs, Overbeck & Associates, Inc.* v. *United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971) (a "ruling is merely the opinion of a lawyer in the agency").

Finally, the Government's argument that the settlement amounts in this case are simply back pay, and taxpayers will be taxed as they should be if the Government prevails, is factually incorrect. The settlement awards were not measured arithmetically as the equivalents of inadequate compensation. The awards, compared to annually received wages, are lump sum, thereby if taxable possibly throwing taxpayers into a higher bracket under section 1 of the Internal Revenue Code. The awards, compared to additional compensation which might have been paid in prior years, are deferred without interest; they do not take into account time values. The victims of Title VII discrimination in this case also for years sustained a lower standard of living, lower prospects of promotion, a loss of self-esteem, stigmatization in effect as "mere female" employees, and other intangible injuries resulting from the discrimination. The settlement awards certainly provide redress for these intangibles as well as past discriminatory lower wages.

In dealing with the argument that the taxpayers in this case should be taxed because additional compensation for past years would have been taxable, the Tax Court has concluded, "Whether the damages paid to the tort victim reflect a substitute for amounts or items otherwise taxable or a substitute for amounts or items to be enjoyed without a tax consequence is

irrelevant." *Downey* v. *Commissioner*, 97 T.C. at 163-64. If any party is to limit a Congressional provision for exclusion, it should not be the tax collecting administration. Nor do courts have the power to rewrite statutes according simply to their views of sound policy. The prerogative of revising the substance of a Congressional Act belongs to the Congress.

Section 104(a)(2) reflects a policy that the Federal Government ought not take its usual tax percentage cut out of situations of misfortune, misery, unfairness and justified unhappiness. The Internal Revenue Service is not entitled to change this statutory policy.

CONCLUSION

For the reasons set forth here, we respectfully request that the opinion and decision of the Court below be affirmed.

Respectfully submitted,

WALTER J. ROCKLER
Counsel of Record
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6789
Attorney for Amicus Curiae

Of Counsel:

JONATHAN B. BURNS
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

December 23, 1991